No. 22691

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

E. ARTHUR BARROWS, *et al.*,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' CLOSING BRIEF.

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Statement of the Case.

Appellants disagree with portions of Appellee's Statement.

Appellee has sought to minimize the location of the Barrows claim two full years before the Common Varieties Act of 1955 became effective. Appellants Barrows did more than merely post and record a notice of location—Mr. Barrows worked the claim and sold the mined material long before 1955, at a profit. Sand and gravel mining operations on the claim have been conducted, not since 1960, as suggested by Appellee, but since they began there in 1953. It *is* true, however, that the Forest Service waited until 1964 before contesting validity of the claim.

The administrative contest which the government elected to file contained three charges of invalidity—none of them the one stated by Appellee.

Contrary to Appellee's statement, the United States charged only one of Appellants with contempt. He was the sublessee-operator of the substantial mining improvements on the claim. That proceeding was dismissed. There has been no contempt and no violation of any order of the Court. Once the operator understood the Court's true intent, all mining ended.

The Statement of Appellee in its Brief points up the true situation.

The United States elected to question validity of the claim eleven years following its location, and after eleven years of its operation as a sand and gravel business, through administrative proceedings, *not* through the courts. Then, three years later, without waiting for a final and reviewable administrative decision of invalidity to be obtained, *it also sued* in the courts to enjoin the mining operation *and* to recover damages for material removed over the period of years the claim had been operated.

ARGUMENT.

I.

The Temporary Injunction Was Not Proper Pending Final Administrative Action.

Appellee seeks to have this Court apply here the customary rule which gives jurisdiction to the federal and state courts to determine controversies *between private citizens* as to their respective rights of possession of patented and unpatented public domain. In such cases, the parties may therein offer evidence and be heard upon, and may secure a decision upon, the issue of right of possession.

The *Archer* case, cited on page 6 of Appellee's Brief, did not involve an entry on the public domain; it involved the private lands of the petitioner and a tresspass and conversion by the other party. The decision in *Erhardt v. Boaro,* 113 U.S. 537 (1885), also cited by Appellee, is another example of the rule between private litigants, but is not applicable here.

The same comments apply to the *Gauthier, Perego, Bowen* and *Northern Pacific Railway Co.* cases, also cited by Appellee on page 6 of its Brief.

Appellee generally states in its Brief (p. 7), that "the United States as a property owner is in no worse position than any other property owner", citing *United States v. Schultz,* 31 F. 2d 764 (N.D. Cal., 1929), and *Kennedy v. United States,* 119 F. 2d 564 (C.A. 9, 1941).

The *Schultz* case, a 1929 decision in the trial court held, 34 years before the *Best* decision, that the United

States could *elect* whether to proceed in the courts *or* the Interior Department when it initiated its proceedings to vindicate its rights in public lands. Here it *elected* to proceed in the land office. It certainly may not badger claimants with a multiplicity of proceedings, and proceed in both courts and land office.

The *Kennedy* case of 1941 came 22 years before the *Best* decision. It recognized, quoting the *Schultz* opinion, that the United States could elect to seek judicial *or* administrative relief. In *Kennedy,* it sought judicial relief.

Here it elected to seek agency relief in 1964, possibly following the *Best* decision of 1963. Herein is the distinction—the agency has complete jurisdiction of the question of the validity of the mining claim, and therefore of the right to possession. The courts, under the authorities here applicable, such as *Best* and others cited in our Opening Brief, have none until a final decision is entered.

The true rule is set out in the many cases cited in Appellants' Opening Brief, with which Appellee has taken no exception.

Before moving to the next point in Appellee's Brief, we point out that Appellee has misinterpreted the opinion of the Supreme Court in *Best*. There were *two* court cases involved in the *Best* controversy—a civil suit first filed by the United States in eminent domain, in which, at the outset, the government secured an order for immediate possession, and a second suit (which eventually reached the Supreme Court) filed by the claimant

to enjoin prosecution of an administrative contest against the mining claims there involved and which contest had been filed in the land office after the first suit was instituted. The claimant sought to have the Court in the eminent domain case determine the validity of the involved claims. It appears from the decision of the District Judge in the second suit for an injunction (*Humboldt Placer Mining Company v. Best,* D.C., N.D., Calif., N.D., 1960, 185 F. Supp. 290), and of this Court on appeal in that case (293 F. 2d 553), that the District Judge in the eminent domain case had held the latter case in abeyance pending a final decision in the administrative contest. The District Judge in the second (injunction) case refused to enjoin the contest proceedings and dismissed the second suit upon the apparent belief that both the Court in the eminent domain case *and* the Department had jurisdiction to determine validity. This Court held that the first suit was the act of the Secretary first invoking a determination by the courts, and the election left him without retained jurisdiction to determine the issue in the Department. The Supreme Court, on appeal in the *injunction* case, held that the Court in the eminent domain case had properly held that case in abeyance, and that the issue of validity belonged in the Department even though the contest had not been filed until after the suit to condemn had been brought. The condemnation suit was filed to acquire title, with the customary incidental order for immediate possession. *Best* is not authority for the proposition advanced by Appellee. It runs to the contrary.

II.

The Secretary Can Make Any Agency Decision Final and Ripe for Judicial Enforcement at Any Time.

At page 8 of Appellee's Brief the bare statement is made that the "oft-cited plenary powers of the (Interior) Department pertain only to the validity question", and the argument is made that the government is powerless to protect the public interest unless it has recourse to courts. No authority is cited. The point of urgency is curiously raised in this case, where the claim has been operated since 1953, not even contested until 1964.

The Secretary of the Interior, at *any time,* may exercise the powers given him by Congress and make or make final an administrative decision relating to the validity of a mining claim on the public domain, thus immediately affording the interested agency or the Secretary the right to seek judicial relief. (5 *U.S.C.* sec. 557, formerly sec. 1007; *Susquehanna-Western, Inc.,* A-30714, dec. 8/18/67; *Public Service Co. of New Mexico,* 71 I.D. 427 (1964).) A bare trespass or conversion can be controlled by appropriate action under the criminal statutes, as, it would seem, a fraudulent misuse of the public land laws could be controlled. The administrative practice followed by the Secretary in joining in a Bureau of Land Management decision, so the matter thus made final will be ripe for immediate consideration by the courts, is well known and often used.

III.

The Action Should Be Dismissed.

Decisions of both a hearing examiner and of the Director of the Bureau of Land Management are not binding on the Secretary, who holds that findings of fact by these officers are not binding on him. (*United States v. Middleswart,* et al., 67 I.D. 232 (1960).)

The Secretary even holds himself not bound by formal stipulations made by representatives of the United States in contest proceedings and hearings. (*Stanislaus Elec. Power Co.,* 41 L.D. 655 (1912).)

Where, then, can there be *any* effective or legally recognized decision of invalidity prior to a *final* decision under the Secretary's own regulations and the Administrative Procedure Act? (5 U.S.C. sec. 537). With stipulations, findings of fact, and the very decision itself not binding on either the Director of the Bureau of Land Management or the Secretary, who asserts and exercises total freedom to ignore, disavow, or adopt them, such an initial, ineffective decision cannot become the foundation for a judicial action to enforce it. The very pendency of the contest proceeding foreclosed appellees from any attempt to show in the judicial enforcement proceeding (this case) that they really had a valid mining claim. Use of the examiner's decision as a foundation for a cause of action is here sought to be made under circumstances in which it cannot be questioned or reviewed.

Due process requires that validity be determined in only *one* proceeding, namely, the Interior Department

proceeding, and that it is only a *final* agency determination, one ripe for judicial review, that may be the basis of a judicial action to enforce it through injunction, ejectment and assessment and collection of damages.

And, pending entry of that *final* and *reviewable* agency action (which may be substantially expedited by the Secretary under appropriate *or any* circumstances, as noted above), the mining claimant, prevented from proving to a court the validity of his claim, should not be deprived of due process by being subjected to a civil action for injunctive relief and damages or to the restraint of an injunctive order issued *pendente lite* in such an action.

The *Light, Debs,* and *Petersen* cases, cited on page 9 of Appellee's Brief, are not in point, for they involved trespassers who made no attempt to comply with public land laws and regulations governing entries thereon, and who usurped public property or the use thereof.

Conclusion.

For the foregoing reasons, and those set out in Appellants' Opening Brief, this Court should reverse the Order appealed from, and direct dismissal of the action.

Respectfully submitted,

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July 17, 1968.